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1. Chronological List of Dates of Pleadings, Hearings, Orders, etc.

A. The Original Trial and Direct Appeals

1. **April 17, 1964** – Discovery of bodies of three murdered policemen.
2. **August 23, 1965** – Indictment of Evans for the murder of one of the police officers.
3. **October 18-21, 1965** – Trial of Evans in the Gwinnett County (Georgia) Superior Court.
4. **October 21, 1965** – Return of "guilty" verdict by jury and sentence of the trial court.
5. **July 7, 1966** – Judgment of trial court affirmed by the Supreme Court of Georgia.
6. **November 14, 1966** – Denial of Certiorari by the Supreme Court of the United States.

B. The Present Habeas Corpus Proceeding

1. **December 14, 1966** – Application of Appellee Evans to the United States District Court for the Southern District of Georgia for a Writ of Habeas Corpus.
2. **December 14, 1966** – Order of the United States District Court for the Southern District of Georgia, directing Appellant, A. L. Dutton, Warden, Georgia State Prison, to make his return and show cause why the application should not be granted.

3. **December 30, 1966** – Return of Appellant Dutton filed.

4. **April 25, 1967** – Hearing before the United States District Court for the Southern District of Georgia.

5. **May 1, 1967** – Order of the United States District Court for the Southern District of Georgia transferring the case to the United States District Court for the Northern District of Georgia.

6. **May 19, 1967** – Hearing before the United States District Court for the Northern District of Georgia.

7. **September 6, 1967** – Order of the United States District Court for the Northern District of Georgia denying Appellee Evans' application for a Writ of Habeas Corpus.

8. **September 6, 1967** – Judgment entered by the United States District Court for the Northern District of Georgia in favor of Appellant Dutton and against Appellee Evans.

9. **May 9, 1968** – Hearing before the United States Court of Appeals for the Fifth Circuit.

10. **September 16, 1968** – Opinion of the United States Court of Appeals for the Fifth Circuit reversing the decision of the United States District Court for the Northern District of Georgia.

11. **September 16, 1968** – Judgment of the

United States Court of Appeals for the Fifth Circuit reversing the judgment of the United States District Court for the Northern District of Georgia.

12. **September 26, 1968** – "Notice of Appeal" to the Supreme Court of the United States filed by Appellant Dutton in the Court of Appeals.

13. **December 13, 1968** – Jurisdictional Statement filed in the Supreme Court of the United States by Appellant Dutton.

14. **February 24, 1969** – Probable jurisdiction noted by the Supreme Court of the United States.

2. Relevant portions of Appellee Evans' "Application for Writ of Habeas Corpus," filed in the United States District Court for the Southern District of Georgia on December 14, 1966.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA ex rel. ALEX S. EVANS v. A. L. DUTTON, WARDEN of the State Prison at Reidsville, Georgia	CIVIL ACTION NO. 2072

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE FRANK SCARLET, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA:

The petition of Alex S. Evans respectfully shows this Court the following facts:

-1-

Petitioner is unlawfully imprisoned and detained by A. L. Dutton, Warden of the State Prison at Reidsville, Georgia.

-2-

Petitioner is unlawfully imprisoned and detained by the said A. L. Dutton under and by virtue of a judg-

ment, sentence and order passed by the trial judge of the Gwinnett Superior Court.

-3-

Petitioner was indicted, tried and convicted of the offense of murder without a recommendation of mercy by the jury in Gwinnett Superior Court. The said verdict was entered on October 21, 1965 and petitioner was sentenced to death by electrocution on October 21, 1965 by the trial judge.

-4-

Petitioner has appealed to the Georgia Supreme Court and the decision of the trial court was affirmed on July 7, 1966. A motion for rehearing was denied by the Georgia Supreme Court on July 21, 1966. The Supreme Court of the United States denied certiorari on November 14, 1966. Petitioner has exhausted his state remedies. Copies of the opinions rendered by the Georgia Supreme Court are attached hereto and marked Exhibit "A" and made a part hereof.

-5-

The facts and law relied upon by petitioner in bringing this application will be fully set out herein but petitioner's basic contention is that he is unlawfully detained because fundamental rights granted him by the Constitution of the United States have been violated.

The indictment on which Petitioner was tried and convicted was returned by the Grand Jury of Gwinnett County, Georgia, as a true bill on August 24, 1965. This indictment was one of a series of indictments growing out of the murder of three Gwinnett County police officers which occurred on April 19, 1964. It charged Peti-

tioner jointly with Venson Eugene Williams with the murder of officer Jerry S. Everett. In all, nine indictments had been returned by this Grand Jury. Three were returned on July 1, 1965, charging three defendants, Petitioner, Williams and Wade L. Truett, with the murder of each of the three officers. Three were returned on August 24, 1965, again charging all three defendants with the murder of each of the three officers. On the same date, the Grand Jury returned three additional indictments, charging only Petitioner and Williams with the murder of each of the three officers.

Indictment No. 7284, in which only Petitioner and Williams were charged with the murder of Officer Everett was scheduled by the State for initial prosecution. Trial of Petitioner on this indictment followed a week after the trial of Williams on the same indictment. Prior to arraignment and trial, Petitioner filed several motions, including motion for severance. This motion was granted. In addition, he filed a motion to produce and divulge information and motion to produce certain documents. These motions were overruled. In the selection of the trial jury, defendant objected to the disqualification of jurors who stated on voir dire that they were conscientiously opposed to capital punishment. He further objected to the placing on him as a juror one Hubert H. Higgins, for the reason that said juror would not state that his verdict would not be affected by his relationship to one of the deceased officers.

During the course of the trial, the testimony of one Lynwood Shaw was offered by the State and admitted over objection of Petitioner with respect to a statement made to him by co-defendant Williams. Wade L. Truett,

a co-defendant, was offered as a witness by the State. Prior to the introduction of his testimony, Petitioner filed a written motion and made an oral motion to exclude the testimony. These motions were likewise overruled. In the process of this witness' testimony, it was revealed that he made a statement which was recorded by tape recording and also a written statement. An oral motion to require the State to produce this testimony for examination by the defense was overruled.

Petitioner was placed on trial on October 18, 1965, and the verdict, without recommendation of mercy, was returned October 21, 1965. The death sentence was imposed on the same date. A motion for new trial was timely filed and thereafter the same was overruled on May 1, 1965. Subsequent appellate proceedings and the results thereof are stated under Section (b) above. Petitioner hereinafter specifies the stages in the proceedings in the court of the first instance and in the Appellate Court and in which manner the questions sought to be reviewed were raised, the method of raising them and the way in which they were passed upon by the courts. Pertinent quotations of portions of the records will be supplied.

* * *

During the course of the trial, Lynwood W. Shaw was called as a witness (R. pp. 129-163). As Shaw had testified at the earlier Williams' trial, Petitioner's counsel could anticipate his testimony. Accordingly when the witness was asked by the prosecutor about a conversation which had transpired between the witness and Williams, Petitioner objected in the following language:

"MR THOMPSON: If it please the Court, we

object to any conversation had between this witness and Williams, any other party out of the presence of the defendant as being hearsay.

THE COURT: Objection overruled.

MR. THOMPSON: If it please the Court, we have a further objection, we would like to make and feel probably should be made out of the presence of the jury.

THE COURT: I will ask you to retire to your Jury Room, Gentlemen. All right, state your objection.

MR. THOMPSON: If it please the Court, we object to this witness testifying as to any conversation had with the defendant Williams out of the presence of the defendant on the grounds that such evidence such testimony would be hearsay, that this defendant is entitled to be confronted with the witnesses who testify against him under the provisions of the United States Constitution and under the Constitution of the State of Georgia, and to permit this witness to testify as to what somebody else told him would be in substance to permit the testimony of another witness or another party to testify through this man's lips and to deny the defendant the right of confrontation guaranteed by Article 1, Paragraph 5 of the Constitution of the State of Georgia of 1945, Georgia Code Section 2-105 and of the Constitution of the United States, Sixth Amendment, Section 1-806 of the Code. We are aware of the fact there is a statute of the State of Georgia which provides, that is Georgia Code Section 38-308 – 306, which provides that after the fact of conspiracy shall

be proved the declarations by any one of the conspirators during its pendency of the crime the criminal project shall be admissible against all. We submit that if the Statute is construed by this Court to permit hearsay testimony under the circumstances present here, that it would be a violation of the two sections of the Constitution that we have referred to above. Just one moment.

If it please the Court –

THE COURT: Anything further in your motion?

MR. THOMPSON: Yes, sir, further objection, we urge that in order for a – statement ex parte, that is hearsay statement, that is a statement made out of the presence of the defendant to be admissible against the other defendant on trial, the same must be made during its pendency of the conspiracy and in furtherance of the conspiracy. Now, on the three grounds that we have stated, we submit that the testimony that this witness is about to give is not admissible and perhaps in some respect, our objection and motion might be premature, but we submit if the witness is permitted to testify as we anticipate, he will – having heard his testimony on the prior trial, it will be so prejudicial – it will so prejudice the minds of the Jury that to make an objection subsequently and to make these objections, I should say subsequently, would be of little avail even though the Court should sustain them and would withdraw the testimony or the evidence from the Jury's consideration. So we are making this motion at this time prior to the introduction of the testimony. . . ." (R. 141-143)

• • •

"THE COURT: Gentlemen, the Court is ready to rule on the thing. I don't want to cut off further argument, the motion is in the record. It is the opinion of the Court that the conspiracy prima facie has been established by the testimony in this case and it now becomes a question of the Jury and the Court must submit it to the Jury the question whether or not the conspiracy has or has not been established, and if the Jury should find a conspiracy has been established, then the testimony or statements or acts of any one connected with the conspiracy during its continuance, before or concealment after the crime, I think would be admissible against all who participated therein. The Court therefore overrules your objection, Mr. Thompson, and will allow the answer." (R. 147-148)

Following this ruling of the Court, the witness Shaw was permitted to testify that he had had a conversation with Williams following the latter's arraignment on the murder charge in Gwinnett County. He testified further:

"Q. Asked him — speak a little louder.

A. I went to his room in the hospital and asked him how did he make out in Court.

Q. Asked him how did he make out in Court?

A. How did he make out in Court.

Q. What was his response?

A. He said, 'if it hadn't been for that dirty-son-of-a-bitch, Alex Evans, we wouldn't be in this now.' " (R. 148)

Following the above testimony, Petitioner renewed

the objection previously made and moved the Court to exclude the testimony quoted above. The Court overruled these motions. (R. 149).

* * *

-6-

Petitioner was denied due process of law on the record hereinbefore recited for the reasons:

* * *

(e) He was denied confrontation and the right to cross-examine a witness whose testimony was used against him, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and as guaranteed him under Article I, Paragraph V of the Constitution of the United States. (Brookhart v. Janis, ... U.S. .....; 16 LEd2d 314).

(f) There was permitted to be used against him at the trial hearsay testimony of an alleged co-conspirator, admitted in evidence pursuant to Ga. Code Section 38-306, which Code Section, as applied in this case, is unconstitutional and violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

* * *

-7-

By reason of each of the foregoing grounds, and all of them collectively, the conviction, sentence and imprisonment of Petitioner as aforesaid are unlawful and in violation of the Constitution of the United States of America.

WHEREFORE, Petitioner prays that a writ of habeas corpus issue to the said A. L. Dutton, Warden of the State of Georgia Prison at Reidsville, Georgia, requiring him to produce the body of your petitioner before this court at some convenient time to be therein designated, there to abide what shall be awarded by the court in the premises, and that Petitioner be discharged from said imprisonment; that a stay of execution be granted by this court pursuant to 28 USC 2251; and that the stay of execution remain in force throughout the proceeding in this Court and throughout any appeal that may lie from the decision of this Court.

Respectfully submitted,

P.O. Box 679
Gainesville, Ga.

/s/ ROBERT B. THOMPSON

ROBERT B. THOMPSON

/s/ E. C. BRANNON, JR.

E. C. BRANNON, JR.

Attorneys for Petitioner

(Jurat and Opinion of the Supreme Court of Georgia attached as Exhibit "A" to Application omitted in printing)

3. Order of the United States District Court for the Southern District of Georgia dated December 14, 1966, directing Appellant Dutton, Warden, Georgia State Prison, to make his return and show cause why the Writ of Habeas Corpus should not be issued.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA ex rel. ALEX S. EVANS vs. A. L. DUTTON, WARDEN, GEORGIA STATE PRISON, REIDSVILLE, GEORGIA.	CIVIL ACTION NO. [illegible]

ORDER

Good cause appearing therefor, and upon reading the verified petition in the above stated case, and after due deliberation thereon, it is upon consideration,

ORDERED that the Respondent make his return and show cause within twenty (20) days from the date on which this Order is filed with the Clerk, pursuant to the provisions of 28 U.S.C. 2243, why a Writ of Habeas Corpus should not be issued herein, as prayed for; and

FURTHER ORDERED that, in compliance with this Order to show cause, the Respondent make his return as directed above and include therein any affidavits, court records, or other documents showing why the Writ

of Habeas Corpus should not be issued, together with a proposed order in the matter; and

FURTHER ORDERED that the Respondent retain custody of the Petitioner until further order of this Court; and

FURTHER ORDERED that the Clerk of this Court serve copies of this Order, together with a copy of the petition, on the Petitioner, the Respondent, and the Attorney General of the State of Georgia, as Counsel for the Respondent.

This 14th day of December, 1966.

/s/ F. M. SCARLETT

F. M. SCARLETT
United States District Judge

4. Return and Answer of Appellant Dutton filed on or about December 30, 1966 (excluding exhibits).

(Title omitted in printing)

RETURN AND ANSWER

Comes now A. L. DUTTON, Warden of the Georgia State Prison at Reidsville, Georgia, respondent in the above-styled case, and makes this his Return and Answer to the Petitioner's Application for Writ of Habeas Corpus, showing the Court as follows:

FIRST DEFENSE

The Petitioner is not entitled to the writ because his Application does not present any substantial federal question for determination by this Court.

SECOND DEFENSE

The Petitioner is not entitled to the writ because he has failed to state a claim against Respondent upon which relief can be granted.

THIRD DEFENSE

The Petitioner is not entitled to the writ because of the following facts and circumstances:

1. The merits of the factual disputes and contentions upon which Petitioner relies in his averments that various rights secured to him by the United States Constitution have been violated were resolved during the state court proceedings;

2. The state factual determinations are fairly supported by the record as a whole;

3. The fact-finding procedure employed by the state court was adequate to afford a full and fair hearing;

4. There is no allegation of newly discovered evidence;

5. The material facts were adequately developed during the state court proceedings; and

6. It does not appear, for any reason, that the state court proceedings in which the facts were developed did not afford Petitioner a full and fair hearing.

In support of this defense, Respondent, at the time of the hearing on Petitioner's Application for Writ of Habeas Corpus, will tender into evidence the complete transcript of the state court proceedings.

FOURTH DEFENSE

Respondent answers the specific factual allegations set forth in Petitioner's Application for Writ of Habeas Corpus as follows:

1. Respondent admits the allegation of paragraph one of the Application that Petitioner is imprisoned and detained by Respondent but denies that such imprisonment and detention is "unlawful."

2. Respondent admits the allegation of paragraph two of the Application that Petitioner's imprisonment and detention by Respondent is by virtue of a judgment, sentence and order passed by the trial judge of the Gwinnett Superior Court, but denies that such imprisonment and detention is "unlawful."

3. Respondent admits the allegations of paragraph three of the Application.

4. Respondent admits the allegations of paragraph four of the Application and further shows the Court that the opinion of the Supreme Court of Georgia is set forth in the official reports as *Evans v. The State,* 222 Ga. 392 (1966).

5. Paragraph five of the Application covers approximately thirty pages thereof, setting forth both Petitioner's view of the facts of the case and various legal contentions regarding the facts alleged. While Respondent deems the factual allegations of paragraph five to be somewhat incomplete, Respondent does not dispute the substantial accuracy of the same except to the extent that in the last sub-paragraph of said statement Petitioner incorrectly implies that the testimony of Petitioner's accomplice and co-conspirator, Wade L. Truett, was uncorroborated. Such testimony was, in fact, corroborated by physical evidence, as well as the evidence of other witnesses. See *Evans v. State,* 222 Ga. 393, 403-407 (1966).

6. Paragraph six of the Application sets forth Petitioner's legal contentions as to why the writ should be granted which requires no answer except that Respondent denies that such contentions are valid or meritorious.

FIFTH DEFENSE

Answering further, Respondent shows the Court that each and every contention of Petitioner respecting the alleged violation of rights secured to him under the United States Constitution has been fully, fairly, properly and correctly disposed of in the state court proceedings and that none of such contentions present a substantial federal question for determination by this Court.

SIXTH DEFENSE

Answering further, Respondent shows the Court that Petitioner is lawfully imprisoned and detained by Respondent pursuant to a valid indictment, plea, verdict and sentence, certified copies of which are attached as Exhibit "A" hereto and incorporated by reference herein.

WHEREFORE, having fully made this Return and Answer, Respondent prays:

(a) That Petitioner's Application be denied;

(b) That the Writ of Habeas Corpus not issue;

(c) That the Petitioner be remanded to the custody of the Respondent; and

(d) That Respondent have such other and further relief as to the Court may seem just and proper.

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Assistant Attorney General

P. O. Address:
132 Judicial Bldg.
40 Capitol Square
Atlanta, Georgia

ALFRED L. EVANS, JR.
Assistant Attorney General
Attorneys for Respondent

(Exhibits, jurats and certificate of service omitted in printing)

5. Order of the United States District Court for the Southern District of Georgia dated May 2, 1967, transferring the case to the Northern District of Georgia.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA, ex rel. ALEX S. EVANS, *Petitioner*	APPLICATION FOR WRIT OF HABEAS CORPUS
vs.	
A. L. DUTTON, Warden, Georgia State Prison, *Defendant*	CIVIL ACTION NO. 2072

ORDER

It appearing that the petition for writ of habeas corpus was filed in the United States District Court for the Southern District of Georgia by the petitioner, Alex S. Evans; It further appearing that there are matters in the case which should be decided by the United States District Court for the Northern District of Georgia; It further appearing that there are common issues in the above styled cause and in the petition for writ of habeas corpus as filed by Venson Eugene Williams against A. L. Dutton, Warden, Georgia State Prison, being Civil Action No. 2057, in the United States District Court for the Southern District of Georgia; It further appearing that counsel for petitioner was engaged in the United States District Court for the Middle District of Georgia

on April 25, 1967, when the above styled case and the case filed by Venson Eugene Williams were sounded for hearing; It further appearing that the two cases should be heard together; It further appearing that this Court has discretion under Title 28 USCA §2241 to transfer the above styled case to the Northern District of Georgia;

IT IS HEREBY ORDERED AND ADJUDGED that the application for writ of habeas corpus as filed in the United States District Court for the Southern District of Georgia be and is hereby transferred for hearing and final determination to the United States District Court for the Northern District of Georgia, Atlanta Division; IT IS FURTHER ORDERED that all of the pleadings and record as heretofore filed in this Court be and are hereby transferred to the United States District Court for the Northern District of Georgia, Atlanta Division; and, IT IS FURTHER ORDERED that the deposition of James H. Stanley as filed in this Court be and is hereby transferred to the United States District Court for the Northern District of Georgia, Atlanta Division; IT IS ALSO ORDERED that the stay of execution as previously granted by this Court is in full force and effect as previously granted and the said transfer does not in any way affect the said order staying the execution.

This 1st day of May, 1967.

/s/ HILL HEWLETT

HILL HEWLETT
Judge, U. S. District Court
Southern District of Georgia

6. Order of the United States District Court for the Northern District of Georgia dated September 6, 1967, denying Appellee Evans' application for a Writ of Habeas Corpus.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION.

UNITED STATES OF AMERICA, ex rel. ALEX S. EVANS vs. A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia	CIVIL ACTION NO. 10923

ORDER OF COURT

The petitioner in the above styled case is under a death sentence. The case was transferred to this district under 28 U.S.C., §2241 (d) (1966) which allows a state prisoner seeking a federal habeas corpus to proceed in the district court for the district in which he was sentenced instead of the district in which he is confined. It was originally brought in the Southern District where the petitioner is confined in Reidsville State Penitentiary.

The petitioner was tried for the murder of the Gwinnett County policemen whose bodies were found handcuffed together on the morning of April 17, 1964. The charges against the petitioner were first made public over a year later, on July 1, 1965.

The petitioner Evans was found guilty on October 21, 1966 and was sentenced to death the same day. The appeal to the Supreme Court of Georgia resulted in affirmance of the trial court, *Evans vs. The State,* 222 Ga. 392, and certiorari to the United States Supreme Court was denied on November 14, 1966, 385 U.S., 953.

The district judge for the Southern district where this case was originally filed entered an order staying the execution of Evans on December 14, 1966. The order of transfer to this district specified this last mentioned order would remain in effect.

The State does not take the position in its reply that all state remedies have not been exhausted. It contends, however, that the state court determination on these questions is correct and that no substantial federal question is presented. It is said that a full and adequate hearing was had on all factual questions in the state court proceedings and that the factual determinations made by the state court are fairly supported by the record as a whole. Respondent expressly admits that petitioner's motions relating to his constitutional contentions were made and disposed of during the state court proceedings (see page 3, paragraph 6 of the response). Thus it appears state remedies have been exhausted so as to entitle this Court to assume jurisdiction. See *Brown v. Allen,* 344 U.S. 343 (1953); *Whippler v. Balcom* (5 Cir. 1965) 342 F.2d 388; *Rogers v. Davis* (5 Cir. 1963) 323 F.2d 653.

The petitioner Evans raises the same contentions as the petitioner Williams in Civil Action No. 10924 with one addition which will be discussed below. The Court adheres to its rulings made in the Williams case in re-

gard to pre-trial discovery, trial discovery, exclusion of jurors opposed to capital punishment, and the use of testimony from an accomplice who was given immunity. A careful review of the Evans record shows no abuse of discretion in denial of the motion for a change of venue. The failure to exclude the juror Higgins caused no injury to the petitioner's rights because this juror was later challenged preemptorily by one of the nineteen strikes exercised out of an available twenty.

In addition to the grounds raised by Williams the petitioner Evans also contends he was denied his constitutional right to confront a witness whose testimony was used against him. At the trial a witness on behalf of the state, Lynwood Shaw, testified that he was a fellow inmate at the Atlanta Penitentiary with Evans' co-indictee Williams when the latter was arraigned under the murder charge. He stated that Williams stated to him after his return from court that

> "If it had not been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."

While it may be slightly confused from the record, it appears that petitioner's real contention is the petitioner's right to confrontation and cross-examination pertains to Williams, the co-conspirator who made the above statement. The same complaint was made to the trial judge and before the Georgia Supreme Court which held the evidence admissible, citing Ga. Code Section 38-306 which provides,

> ". . . after the fact of conspiracy shall be proved, the declarations by one of the conspirators during the pendency of the criminal project shall be admissible against all."

Citing a Georgia case the Supreme Court stated further,

> "The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other."

The Court stated,

> "The defendant, and his co-conspirator Williams, at the time this statement was made, was still concealing the identity, keeping secret the fact that they killed the deceased, if they had, and denying their guilt." See *Evans vs. The State,* 222 Ga. 392 (6) at page 402.

Among cases cited by petitioner's counsel is the case of *Pointer vs. Texas,* 380 U.S. 400, wherein the Court points out the value of the right of confrontation guaranteed under the Sixth Amendment and covered by the Fourteenth Amendment. However, the Court points out exceptions to the necessity of confrontation stating,

> "This Court has recognized the admissibility against an accused of dying declarations and of testimony of a deceased witness who has testified at a former trial. There are other analogous situations which might not fall within the scope of the Constitutional rule requiring confrontation of witnesses." See 13 Led 2nd at page 928.

Professor Wigmore in discussing the right of confrontation and cross-examination refers to such exceptions to the hearsay rule and in connection therewith he points out, "Others might be expected to be developed in the future." He stated "The Constitution does not prescribe what kinds of testimonial statements shall be given infra-

judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed." See *Wigmore on Evidence,* Vol. V, page 131. It is well established under Federal law that statements by co-conspirators are admissible against other conspirators if made during pendency of the conspiracy or while it was being concealed. There was other evidence that petitioner Evans was a conspirator. The evidence was admissible under Georgia law and did not violate any Constitutional right of petitioner. In a habeas corpus proceeding by a state prisoner if there is error it must amount to a deprivation of a constitutional right. *Commonwealth of Pennsylvania vs. Maroni,* 348 F2nd 22 and cases cited.

After a careful examination of the entire record in the state court this Court can find no denial of a constitutional right which would entitle the petitioner Evans to a writ of habeas corpus from this Court. The relief prayed for is DENIED and the Clerk is directed to enter a Judgment in accordance herewith.

The stay of execution, heretofore entered, is ordered to continue in effect thirty (30) days from the date of this Order so that counsel may move the appellate court for further relief if they deem such action appropriate.

This the 6th day of September, 1967.

/s/ FRANK A. HOOPER

FRANK A. HOOPER
Senior District Judge

7. Judgment entered by the United States District Court for the Northern District of Georgia dated September 6, 1967, in favor of Appellant Dutton, Warden and against Appellee Evans.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, ex rel. ALEX S. EVANS vs. A. L. DUTTON, Warden Georgia State Prison, Reidsville, Georgia	NO. 10923 CIVIL ACTION

JUDGMENT

The Court, Honorable Frank A. Hooper, United States District Judge, by order of this date having denied the petition for writ of habeas corpus,

JUDGMENT is hereby entered in favor of the respondent and against the petitioner.

Dated at Atlanta, Georgia, this 6th day of September, 1967.

CLAUDE L. GOZA, Clerk
By: /s/ ROBERT J. TIDWELL
Deputy Clerk

Filed and entered in
Clerk's Office this
September 6, 1967
CLAUDE L. GOZA, Clerk
By: RJT
Deputy Clerk

8. Order of the United States District Court for the Northern District of Georgia dated September 21, 1967, allowing Appellee Evans' application for an appeal in forma pauperis.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, ex rel. ALEX S. EVANS vs. A. L. DUTTON, Warden Georgia State Prison, Reidsville, Georgia.	CIVIL ACTION NO. 10923

CERTIFICATION ON APPLICATION FOR AN APPEAL IN FORMA PAUPERIS

After careful consideration the Court hereby certifies that the petitioner's application for an appeal in forma pauperis is taken in good faith and the same is hereby ALLOWED.

At Atlanta, Georgia, this the 21st day of September, 1967.

/s/ FRANK A. HOOPER

FRANK A. HOOPER
Senior District Judge

9. Opinion of the United States Court of Appeals for the Fifth Circuit dated September 16, 1968, reversing the decision of the United States District Court for the Northern District of Georgia.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25348

ALEX S. EVANS,

Appellant,

VERSUS

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(September 16, 1968)

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge.

GEWIN, Circuit Judge: A year and a half after three police officers were found shot to death in Gwinnett County, Georgia, appellant Evans was tried before

a jury and convicted of the murder of one of the officers. Since the jury did not recommend mercy, the Gwinnett County Superior Court sentenced him to die in the electric chair. Having exhausted his state remedies,[1] Evans filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, alleging that his conviction had been obtained in violation of his sixth and fourteenth amendment rights. The district court denied the petitioned relief and Evans has appealed to this court. We have determined that Evans was denied his sixth and fourteenth amendment right to be confronted by the witnesses against him. We therefore reverse the judgment of the district court.

This case was argued before this court with *Williams v. Dutton*[2] which was the appeal of an alleged coconspirator of Evans. The relevant background facts are set forth in *Williams* and we will not repeat them here. In addition, most of the issues raised are common to both cases. Since we must reverse on the confrontation question, we do not reach Evans' other contentions.[3] However, we should point out that many of the same issues will arise upon the retrial of this case and, in the interest of sound judicial administration, we commend

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[1]The Georgia Supreme Court affirmed Evans' conviction, Evans v. State, 222 Ga. 392, 150 S.E.2d 240 (1960), and the United States Supreme Court denied his petition for a writ of certiorari. Evans v. Georgia, 385 U.S. 953 (1966).

[2]_____ F.2d _____ (5th Cir. 1968) [No. 25349, August 20, 1968].

[3]The other contentions concern the availability and extent of discovery to a criminal defendant against the state; the qualification of jurors; the admissibility of the testimony of a witness who has been granted immunity from prosecution; and the availability of discovery in a federal habeas corpus proceeding.

a reference to the treatment in *Williams* of those constitutional questions.

The facts upon which Evans' sixth amendment contention rests are not in dispute. During Evans' trial a witness, one Shaw, testified that Williams had stated to him that "if it hadn't been for that dirty-son-of-a-bitch, Alex Evans, we wouldn't be in this now." According to Shaw, Williams made this statement the day after his arraignment in Gwinnett County on the murder charge and in response to Shaw's inquiry as to how Williams had made out in court. At the time of the alleged statement, both Williams and Shaw were serving sentences for unrelated crimes in the federal penitentiary in Atlanta, Georgia.[4]

Evans' counsel made a timely and vigorous objection to the statement attributed to Williams, arguing that it was inadmissible under both state evidentiary law and the sixth amendment. The trial court overruled counsel's objection, holding the statement admissible in evidence under a Georgia statute which provides:

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[4]Shaw's testimony was somewhat incredible. He testified that Williams was talking to him in a normal voice through a ten-by-ten plate-glass window in a prison hospital door, while Williams was lying on a bed in the room and Shaw was standing in the hall. Shaw had stated in the Williams trial that the window was coyered only by wire mesh. The fact that it was covered by a pane of plate glass was brought out in Evans' trial. Moreover, evidence was submitted but rejected by the trial court which tended to show that Shaw's testimony may have been compensation for a respite from the dull routine of prison life.

In spite of its basic incredibility, we are convinced that it cannot be called harmless. *See* Chapman v. California, 386 U.S. 18, 24 (1967): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." In his dissenting opinion, Justice Quillian of the Georgia Supreme Court stated that Shaw's "testimony . . . obviously was prejudicial to the defendant." Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 251 (1966).

> After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.[5]

The Georgia Supreme Court upheld the ruling of the trial court, stating:

> The defendant [Evans], and his co-conspirator, Williams, at the time this statement was made, were still concealing their identity, keeping secret the fact that they had killed the deceased, if they had, and denying their guilt. There was evidence sufficient to establish a prima facie case of conspiracy to steal the automobile and the killing of the deceased by the conspirators while carrying out the conspiracy, and the statement by Williams made after the actual commission of the crime, but while the conspiracy continued was admissible.[6]

The confrontation clause of the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In the early case of *Salinger v. United States* the Supreme Court stated:

> The right of confrontation did not originate with the provision in the 6th Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.[7]

Thus the fact that the framers of the Constitution did

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[5]Ga. Code Ann. § 38-306 (1954 rev.).

[6]Evans v. State, 222 Ga. 392, 400, 150 S.E.2d 240, 248 (1966).

[7]272 U.S. 542, 548 (1926). *See* Dowdell v. United States, 221 U.S. 325, 330 (1911); Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897); Mattox v. United States, 156 U.S. 237, 243 (1895).

not intend to exclude hearsay evidence appears to have been viewed as having ossified the rule as then developed. This is a regrettably shallow assessment of the wisdom and foresight of those responsible for the destiny of this nation.[8] But this view of the confrontation clause presented no difficulty so long as the clause was applicable only in the federal courts, because the confrontation-hearsay rule was then, for all practical purposes, a single principle in federal criminal cases.[9] History complicated the role of the federal judiciary, however, when the fourteenth amendment was adopted and the federal constitutional standard of due process of law was imposed upon the states. Since many of the rights and privileges embodied in the Bill of Rights had long been regarded as fundamental to any concept of ordered liberty, they were expectably enforced against the states under the due process clause of the fourteenth amendment.[10] The enforcement of the confrontation clause against the states now requires the application of a none-too-concrete standard to state hearsay rules which have experienced a various and even erratic evolution.[11] Thus the duty of this court is not only to interpret the framers' original

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[8]*See* Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 229 (1955): "No doubt, these provisions of the Constitution were not calculated to give permanent legal sanction merely to the social arrangements and beliefs of a particular epoch. Like all legal provisions without a fixed technical meaning, they are ambulant, adaptable to the changes of time. That is their strength. . . ."

[9]See cases cited in note 7 *supra*.

[10]*See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment right against unlawful search and seizure). *See generally* Henkin, *"Selective Incorporation" In the Fourteenth Amendment*, 73 Yale L.J. 74 (1963).

[11]McCormick, Evidence § 230 (1954).

concept in light of historical developments,[12] but also to translate into due-process terms the constitutional boundaries of the hearsay rule.[13]

In applying the confrontation clause to the states, the Court in *Pointer v. Texas* stated:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. . . . The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safe-guards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.[14]

However, neither *Pointer* nor any subsequent decision adequately explains how and when a state hearsay rule exceeds permissible constitutional bounds. In spite of the Court's effusive language, the confrontation clause is certainly not violated merely because the defendant is not permitted to confront and cross-examine a witness against him. The Court has approved the admission, under a recognized exception to the hearsay rule, of a statement by a witness who is unavailable at the time of trial despite the fact that the right of confrontation is

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12*See* Cardozo, The Nature of the Judicial Process 51-97 (1949).

13*But see* Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434 (1966), in which the writer argues against this approach to the confrontation clause.

14380 U.S. 400, 404 (1965).

denied.[15] In explaining a previously recognized exception to the right of confrontation, the Court in *Barber v. Page* stated:

> It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination. . . . This exception has been explained as arising from necessity and justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.[16]

Generally but not unexceptionally, some evidence is better than none at all. Thus when rational substitutes for the benefits of confrontation actually exist, there is no reason to exclude hearsay evidence. Although we express no view as to the constitutional validity of any exception to the confrontation requirement which has not been ruled upon, it is important to point out that generally recognized exceptions to the hearsay rule have developed from a painful process of rationalizing the denial of confrontation.[17]

The Supreme Court has now made clear that the rationale of hearsay exceptions in criminal cases must be continually scrutinized and reevaluated. In *Barber* the trial court had admitted in evidence the transcript of testimony given at a prior trial upon the prosecutor's showing that the witness was outside the state.

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[15]Pointer v. Texas, 380 U.S. 400, 407 (1965). *See* Bruton v. United States, 36 U.S.L.W. 4447, 4449 n.3 (U.S. May 20, 1968). Also see the pre-*Pointer* cases cited in note 7 *supra*.

[16]36 U.S.L.W. at 4330.

[17]*See* 5 Wigmore, Evidence §§ 1420-27 (3d ed. 1940).

According to the traditional view, the evidence was admissible because a witness outside the jurisdiction is beyond the compulsory process of the court.[18] The Supreme Court rejected this justification, stating:

> Whatever may have been the accuracy of that theory at one time, it is clear that at the present time increased cooperation between the States themselves and between the States and the Federal Government have largely deprived it of any continuing validity in the criminal law.[19]

We therefore think it clear that, if an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation. A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact.

Appellee in this case states that Evans "demonstrates a rather basic confusion" in contending that his right to confrontation was infringed because witness Shaw did in fact appear in court and testify. However, we think the confusion is appellee's. The testimony objected to was not Shaw's but that attributed by Shaw to Williams who was not in court and who did not testify. Appellee further argues that the Supreme Court authority cited by Evans involved *written* evidence and that those cases, therefore, do not control the *oral* statement involved here. Since appellee has shown no basis for justifying

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[18] *See* McCormick, Evidence § 234, 1954; 5 Wigmore, Evidence § 1404 (3d ed. 1940).

[19] 36 U.S.L.W. at 4330. The Court held that, unless the prosecutor has made a good-faith effort to secure the witness' presence at the trial and failed, the witness cannot be regarded as unavailable.

a different treatment of written and oral evidence, we reject the distinction as untenable.

We have searched in vain for a reason to justify the abridgment of the right to confrontation which obviously occurred in this case. Appellee merely points to Georgia's coconspirator statute which, rather sphinx-like, answers all but the questions we ask. The admission in evidence of the statement attributed to Williams occurred in circumstances which offered no rational substitute for confrontation.[20] In *Douglas v. Alabama*[21] the state called as a witness against the defendant one Loyd, who had already been convicted on the same charge. When Loyd refused to answer questions, the prosecutor proceeded to read a confession, allegedly made by Loyd, which incriminated the defendant. As he read, the prosecutor would pause occasionally and ask Loyd if he had made the statement read, but Loyd refused to answer any questions. The Supreme Court held that the prosecutor's ventriloquistic performance had violated the defendant's sixth amendment right to confrontation. A substantially similar attempt was made in this case to put words into the mouth of Williams who would doubtless have spit them out if he had testified.[22]

In support of the constitutional validity of the Georgia statute under which Williams' alleged statement was admitted, appellee argues that the statute is identical in

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[20]Appellee has argued in his brief that the trend in the law today is to reject the hearsay rule "as a senseless anachronism." Whatever may be the trend of the law of evidence in civil and administrative proceedings, the trend of the criminal law is subject to a different set of circumstances, not the least of which is the sixth amendment.

[21]380 U.S. 415 (1965).

[22]Since Williams pleaded not guilty and subsequently appealed his conviction, it is almost certain that he would have denied making the statement even if he had agreed to testify.

principle to rules in both federal and state courts. Since the denial of confrontation in the present case is without rational justification, we need not consider the implications of a general judicial acceptance of such a rule. However, we should point out that the statute involved here, as interpreted by the Georgia Supreme Court goes far beyond the traditional coconspirator exception to the hearsay rule.[23] The crime had been committed well over a year before the statement was allegedly made. Moreover, all three of the alleged conspirators were at that time in prison serving sentences for other crimes. With all due respect to Georgia's highest tribunal, it is inconceivable that the statement attributed to Williams was made "during the pendency of the criminal project."[24] The authorities relied upon by appellee[25] make clear that the recognized exception relates only to statements actually made while the criminal conspiracy remained alive.[26]

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[23]*See, e.g.*, Fiswick v. United States, 329 U.S. 211, 216-17 (1946); 4 Wigmore, Evidence § 1079 (3d ed. 1940); Annot., 4 A.L.A.3d 684 (1965); 16 Am.Jur.2d *Conspiracy* § 40 (1964).

[24]The Georgia Supreme Court conceded that Williams' alleged statement was "made after the actual commission of the crime." Evans v. State, 222 Ga. 392, 397, 150 S.E.2d 240, 248 (1966). Additionally, contrary to the state court's finding that the coconspirators were still concealing their identity, the appellee in his brief to this court admits that the statement attributed to Williams was "a statement which implicated Evans." In Fiswick v. United States, 329 U.S. 211, 217 (1946), the Supreme Court stated: "[C]onfession or admission by one co-conspirator after he had been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

[25]Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 116-17 (1948); United States v. United States Gypsum Co., 333 U.S. 364, 393 (1948); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917); 31A C.J.S. *Evidence* § 362 (1964). Also see authorities cited in note 23 *supra*.

[26]We think it indicative of the evidentiary quality of the statement attributed to Williams that it would not, under generally recognized rules of evidence, have been admissible even if Williams had testified. We know

As construed by the Supreme Court of Georgia, the statutory coconspirator exception to the hearsay rule authorizes practices repugnant to the sixth amendment under the facts and in the circumstances presented in this case. As applied in this case, the statute collides with Evans' sixth amendment right of confrontation. Since appellant Evans' right to confront the witnesses against him was infringed, it is clear that he is entitled to a new trial within a reasonable time. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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of no rule of evidence which would permit a witness to testify to an incriminating extrajudicial statement made by him sometime in the past.

10. Judgment of the United States Court of Appeals for the Fifth Circuit dated September 16, 1968, reversing the judgment of the United States District Court for the Northern District of Georgia.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25348

D. C. Docket No. CA 10923

ALEX S. EVANS,

Appellant,

VERSUS

A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, A. L. Dutton, Warden, Georgia State Prison, Reidsville, Georgia, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 16, 1968

Issued as Mandate:

11. Appellant's "Notice of Appeal" to the Supreme Court of the United States filed in the United States Court of Appeals for the Fifth Circuit on September 26, 1968.

(Title omitted in printing)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that A. L. DUTTON, Warden, Georgia State Prison, Reidsville, Georgia, the appellee in the above styled proceeding, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Fifth Circuit reversing the judgment of the United States District Court for the Northern District of Georgia. Said judgment of the United States Court of Appeals for the Fifth Circuit was entered in this action on

September 16, 1968 and this appeal is taken pursuant to 28 U.S.C. § 1254 (2).

ARTHUR K. BOLTON
Attorney General

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MATHEW ROBINS
Assistant Attorney General

Counsel for Appellee

(Certificate of service omitted in printing)

12. Relevant excerpts from the transcript of evidence adduced at Appellee's trial for murder in the State trial court and introduced into evidence and made a part of the record during the hearing on Appellee's application for a Writ of Habeas Corpus before the United States District Court for the Northern District of Georgia.

STATE OF GEORGIA	GWINNETT SUPERIOR COURT
v.	No. 7284
ALEX S. EVANS, Defendant	CHARGE OF MURDER

* * *

Transcript of evidence of the above captioned matter, hearing held in Lawrenceville, Georgia, October 18, 19, 20, 21, 1965, sentence of the Court on October 21, 1965, before HONORABLE CHARLES C. PITTARD, Judge, Gwinnett Judicial Circuit.

* * *

Appearances:

For the *STATE OF GEORGIA* :

Reid Merritt, Esquire
Solicitor-General, Gwinnett Judicial Circuit
and,
Luther Hames, Esquire
Special Ass't. Atty. General

For the *DEFENDANT ALEX S. EVANS* :

MR. ROBERT THOMPSON
and,
MR. E. C. BRANNON

OFFICIAL TRANSCRIPT

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[139] with Alex Evans about an Oldsmobile switch?

A Yes, sir, I did.

MR. MERRITT: You can come down.

MR. THOMPSON: Does Counsel imply by that this is in the record there?

MR. HAMES: We didn't want to wait any longer, we think it is.

THE COURT: Who do you wish next, Mr. Merritt?

MR. MERRITT: Mr. Shaw.

LYNWOOD W. SHAW, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MERRITT:

Q Give the Court and Jury your full name, please, sir?

A Lynwood W. Shaw.

Q Where are you originally from, Mr. Shaw?

A Florida.

Q What part of Florida?

A Tallahassee.

Q Do you know Venson Eugene Williams, Mr. Shaw?

A Yes.

Q Did you have an occasion to have a conversation with him this year?

A Yes, sir.

Q When was that conversation?

A It was in July.

Q July of which year?

A Of this year.

[140]

Q 1965?

A Yes.

Q Can you recall more specifically anything about when it was?

A It was on Saturday.

Q First or latter part or middle part of July?

A It was on or about the 11th, I think, 10th, somewhere it was on the weekend, it was Saturday.

Q Could you speak up a little louder.

A It was on Saturday after he had been to Court, to the hearing.

Q Been to Court?

A Yes.

Q Do you know anything about that appearance?

A Beg your pardon?

Q Do you know anything about that appearance?

A I believe it was for arraignment hearing.

Q That Mr. Williams had?

A Yes, sir.

Q Do you know where it was held?

MR. THOMPSON: If it please the Court, we submit that the witness hasn't been identified but from prior knowledge we know he is in the United States Penitentiary.

THE COURT: Wait just a minute, Mr. Thompson. He has been identified as to name and been sworn and whatever else you wish to bring out you may do so, or the State may do so, but this is no proper way [141] to do it.

BY MR. MERRITT:

Q You say this was on Saturday after he had been to a hearing?

A Yes.

Q Do you know where the hearing was?

A Gwinnett County; I am not sure of the town, but it was at the hearing, I was under the impression.

Q All right, speak up a little louder if you would.

A Yes, sir.

Q Did you discuss this with him –

A With –

Q Did you discuss this with him and if so what did you say and what was his response?

MR. THOMPSON: If it please the Court, we object to any conversation had between this witness and Williams, any other party out of the presence of the defendant as being hearsay.

THE COURT: Objection overruled.

BY MR. MERRITT:

Q Tell us what this conversation consisted of, Mr. Shaw?

MR. THOMPSON: If it please the Court, we have a further objection, we would like to make and feel probably should be made out of the presence of the Jury.

THE COURT: I will ask you to retire to your Jury Room, gentlemen.

(Whereupon the Jury was retired from the Courtroom.)

THE COURT: All right, state your objection.

[142]

MR. THOMPSON: If it please the Court, we object to this witness testifying as to any conversation had with the defendant Williams out of the presence of the defendant on the grounds that such evidence, such testimony would be hearsay, that this defendant is entitled to be confronted with the witnesses who testify against him under the provisions of the United States Constitution and under the Constitution of the State of Georgia, and to permit this witness to testify as to what somebody else told him would be in substance to permit the testimony of another witness or another party to testify through this man's lips and to deny the defendant the right of confrontation guaranteed by Article 1, Paragraph 5 of the Constitution of the State of Georgia of 1945, Georgia Code Section 2-105 and of the Constitution of the United States, Sixth Amendment, Section 1-806 of the Code. We are aware of the fact there is a statute of the State of Georgia which provides, that is Georgia Code Section 38-308 — 306, which provides that after the fact of conspiracy shall be proved the declarations by any one of the conspirators during its pendency of the crime the criminal project shall be admissible against all. We submit that if the Statute is construed by this Court to permit hearsay testimony under the circumstances present here, that it would be a violation of the two [143] sections of the constitution that we have referred to above. Just one moment.

If it please the Court –

THE COURT: Anything further in your motion?

MR. THOMPSON: Yes, sir, further objection, we urge that in order for a – statement ex parte, that is hearsay statement, that is a statement made out of the presence of the defendant to be admissible against the other defendant on trial, the same must be made during its pendency of the conspiracy and in furtherance of the conspiracy. Now, on the three grounds that we have stated, we submit that the testimony that this witness is about to give is not admissible and perhaps in some respect, our objection and motion might be premature, but we submit if the witness is permitted to testify as we anticipate, he will – having heard his testimony on the prior trial, it will be so prejudical – it will so prejudice the minds of the Jury that to make an objection subsequently and to make these objections, I should say subsequently, would be of little avail even though the Court should sustain them and would withdraw the testimony or the evidence from the Jury's consideration. So we are making this motion at this time prior to the introduction of the testimony. Now, we do have the transcript of this witness' testimony at the prior trial, we might state in [144] substance, state in effect what we expect the answer to the question to be, concerning his conversation and that is this, the witness on the prior trial was asked the question and the only thing pertinent to this trial of this case, actually, in what statement did Mr. Williams make to you and in response to your

question, how did you make out and his answer he said, "If that dirty S.O.B. Alex Evans hadn't shot Everett, we wouldn't be in this mess." We submit to permit the witness to testify to that before the Jury could not be corrected by motion or objection made after his testimony, and therefore we make the objection at this time, and move that his testimony in that regard to excluded.

THE COURT: I will hear from you, Mr. Hames.

MR. HAMES: May it please the Court, I'm not sure, but I think the exact question that he raises with reference to the confrontation has already been passed on in the case of Rawlins versus the State, to my recollection, it's in that case, I was looking for it here in making a response to the question, but be that as it may, the Code Section says that once the conspiracy is established, the defendant – that the testimony of the acts and declarations of one conspirator out of the presence of the other is not hearsay and he said if this Court construes that to mean that it would be unconstitutional, the Court of Appeals of Georgia in 90 Georgia Appeals, [145] Page 797, Spradling versus the State, it is already construed the Code Section in holding that it is not hearsay, it says the declarations and conduct of brother defendant immediately before the fatal shooting was properly admitted by the Court to explain conduct and sustain motives, not as hearsay, but as original evidence for the reason set forth in the corresponding division of the opinion. That – in that it says Code Section 138-302 provides when a legal in-

vestigation, information or conversation, and also applies to similar evidence or facts to explain conduct and ascertain motives, they shall be admitted in evidence, not as hearsay but as original evidence. Code Section 38-306 provides that after the fact of a conspiracy shall be proved, that the declarations by any one of the conspirators during its pendency of the criminal project shall be admissible against all. The defendant here and reading from the facts of this opinion, the defendant here on trial for murder, which reason it was proper for the State to introduce evidence tending to show premeditation and malice on his part, since no case will be murder without malice, expressed or implied, the conspiracy existence or agreement between two or more persons to do an unlawful act, and may be shown by acts and conduct as well as by proof or express agreement. Breedlove versus State 84 Georgia Appeals, 370, the fact the party **[146]** is – parties received information on which he acted is admissible, not to establish the truth of the information but to explain the conduct of the party. It says following from above, and this is Judge Townsend, certainly one of the most liberal judges of the Court of Appeals to have – to speak for the Court, follows from above, while the Court should be careful to exclude evidence as to hearsay as to the defendant, such declarations of others not named in his presence, such evidence is sometimes admissible and when as here it is so closely connected with the events leading up to the criminal transaction as to have probative value, bearing upon the motive

and conduct of the defendant, the declarations of another, even when made outside the presence of the defendant, may be relevant if so closely connected with the crime itself as to have probative value by showing motive or opportunity on the part of the defendant. In this connection see Jones versus State 63 Georgia 395, Ledbetter versus the State 51 Georgia Appeals, 560, headnote 2 in the case of Garrett versus the State in 157 Georgia on page 817, reading from headnote 1 of that opinion while hearsay testimony is generally inadmissible, when information, conversation or similar evidence is pertinent to explain conduct or ascertain motive such evidence so far as these purposes are concerned, [147] changes in character from hearsay to original evidence, to throw light on the conduct or motive. Now, with reference to the conspiracy remaining open, I had the Rawlins case, Your Honor, 124 Georgia on Page 31, reading from the body – headnote 12 on Page 32 when in the trial of a murder case there is evidence tending to show the accused on trial entered into a conspiracy to slay the deceased, and others, the acts and conduct and sayings of any of the conspirators while the conspiracy was in progress and before the crime was committed, are admissible as evidence as well as acts of conspirators, other than the accused, after the commission of the crime, when the act sought to be proved was contemplated by the terms of the conspiracy to be performed after the perpetration of the crime was completed, and this case was Appealed to the United States Supreme Court and it was affirmed in 201 Georgia –

201 U. S., 638, and reported in 26 Supreme Court, 560, and also cited in 50 law edition 899.

THE COURT: Gentlemen, the Court is ready to rule on the thing. I don't want to cut off further argument, the motion is in the record. It is the opinion of the Court that the conspiracy prima facie has been established by the testimony in this case and it now becomes a question of the Jury and the Court must submit it to the Jury the question whether or not the conspiracy has or has not been [148] established, and if the Jury should find a conspiracy has been established, then the testimony or statements or acts of anyone connected with the conspiracy during its continuance, before or concealment after the crime, I think would be admissible against all who participated therein. The Court therefore overrules your objection, Mr. Thompson, and will allow the answer.

Call the Jury back.

(Whereupon the Jury was returned to the Courtroom.)

THE COURT: You may proceed.

BY MR. MERRITT:

Q Mr. Shaw, at the time you mentioned earlier in your testimony that you had a conversation with Venson Eugene Williams, tell us what that conversation was?

A This conversation took place, as I stated, on Saturday, on or about the 11th of July. This was the day after Venson Williams had been to Court in Gwinnett County. I went to his room, asked him how did he make out.

Q Asked him —speak a little louder.

A I went to his room in the hospital and asked him how did he make out in Court.

Q Asked him how did he make out in Court?

A How did he make out in Court.

Q What was his response?

A He said, if it hadn't been for that dirty-son-of-a-bitch, Alex Evans, we wouldn't be in this now.

[149]

MR. MERRITT: He is with you.

MR. THOMPSON: If it please the Court, we object on the grounds previously stated, we move the Court to exclude the testimony just given.

THE COURT: Mr. Thompson, the Court has already ruled, overruled that.

MR. THOMPSON: I know the Court ruled. We wanted to perfect the record in case, the witness has now testified, if the previous motion is held premature, we wanted to make sure —

THE COURT: State your motion.

CROSS EXAMINATION

BY MR. THOMPSON:

Q Mr. Shaw, this conversation you are relating now, took place where?

A Beg your pardon?

Q Where did this conversation you just related take place?

A In the hospital.

Q In the hospital at the United States Penitentiary at Atlanta?

A Yes.

Q You were in custody of the United States Attorney General at that place, is that correct?

A That's right.

Q What were you doing in the hospital?

A I worked there.

Q What are your duties?

A Doctor's clerk.

Q Doctor's clerk?

[150]

A Yes, sir.

Q Exactly what does that require you to do?

A It requires maintaining records, just most anything that practically — anything that a female secretary would ordinarily do in performing her duties for the doctor on the outside.

Q Now, the doctor's office in which you work is on the first floor of that hospital building is it not?

A That's correct.

Q And the second floor is where some of the patients are located?

A Yes, sir.

Q At the time of the conversation you just referred to, where was Venson Williams?

A Where was he at the time this conversation took place?

Q Yes, sir.

A It took place in Room 4 or 5 on C Ward; I am inclined to believe it was 4, C Ward is the only ward we have a B, C, and D, and E, and the ward – and T Ward. C Ward is a long ward which has private rooms. D Ward has some private rooms.

Q Yes, sir. Where did this conversation take place?

A On C Ward.

Q C Ward?

A Yes.

Q And you think this was Room 4 of C Ward?

A Room 4 or 5, as I said, I am inclined to think it was 4.

Q Could you locate the room by referring to something else there in the building?

A Yes, I can. It is nearly directly off to the right, approximately, maybe four or five feet across the hall from the [151] technicians' office.

Q That is the MTA office?

A Yes, sir, the office would be here and the room is about like that.

Q Yes, sir, then, if it is Room 4 across from that office it would be Room 4 you are talking about, in Ward C?

A Yes, sir.

Q And that is the second floor of the building you work in?

A Yes, sir.

Q Do you remember, – do your duties take you up to that floor, Mr. Shaw?

A Yes, sir.

Q Are you frequently up there?

A Any time that I wanted to go.

Q What functions do you perform on the second floor?

A Well, I make the rounds with the doctor, if I want to find out anything from a patient, if the doctor wants to know anything from the patient he will send me up to find it out or if he wants a chart and no one available to bring it down, I will go up and get it.

Q Then you are permitted freely to go up on the second floor any time you want to?

A Yes.

Q How long had you known Venson Williams at that time, Mr. Shaw?

A How long had I known him?

Q Yes.

A I had only known Venson from the time he entered the hospital, **[152]** Venson was brought in the hospital from an accident, I presume, the records would show that.

Q How long would this be, Mr. Shaw, that you have known him?

A Oh, well – I couldn't give you the exact time, but it was – I was one of the first to talk to Venson when he entered the hospital. By that I mean, they brought him in on the ambulance and carried him to the emergency room.

Q Was this a week, two weeks, month or how long?

A No, sir, it was longer than – you mean that I had known him?

Q Yes, sir.

A It was longer than a month.

Q Longer than a month?

A Yes.

Q Was it two months?

A It could have been, yeah.

Q In the area then of two months that you had known him?

A Yeah.

Q Had you been real close to him, Mr. Shaw?

A Well, no, I wouldn't exactly say close, I would say we had talked on several occasions.

Q Did he discuss his private affairs with you on these occasions?

A Not then.

Q Now – what are you presently serving time in the penitentiary for

A I am presently serving time in the penitentiary for

possession of counterfeit money and possession of U-Drive-It automobile.

Q Is that interstate transportation of stolen motor vehicle?

[153]

A Yes, sir, that's right.

Q Those the only two offenses you are presently serving time for?

A Presently serving, yes – two charges of counterfeit.

Q Yes, sir.

A But it is – counterfeit.

Q Did you go on trial on those two cases or did you plead guilty?

A I went on trial on one in Alabama and plead guilty of the other.

Q That the counterfeiting case in Alabama?

A Yes, sir.

Q Did you testify in that case?

A Did I testify?

Q Yes, sir.

A I did, sir.

Q You were placed under oath, were you not?

A Yes, sir.

Q And you testified under oath?

A Yes, sir.

Q Did you testify in that case that you were guilty of the offense for which you were convicted?

A Certainly did.

Q You testified you were guilty?

A Yes, sir.

Q But you plead not guilty and went on trial?

A Yes, sir. Would you like to know –

Q No, sir.

[154]

MR. HAMES: Your Honor, I think he has a right –

THE COURT: He has a right.

THE WITNESS: Gentlemen, the reason I plead not guilty to the charge, there were two co-defendants in this counterfeit conspiracy, one plead guilty, Mr. Fox, plead guilty. The girl I was with plead not guilty and I plead not guilty to try to get – which the girl was not guilty and I plead not guilty and I got on the stand and told the Jury that I wasn't up there trying to plead not guilty, I had offered to plead guilty, but they wouldn't drop the charges against her and I would plead not guilty and –

BY MR. THOMPSON:

Q The Jury found you guilty and you were sentenced on that?

A Yes, sir.

Q You ever been convicted of any other felony?

A Yes, sir.

Q What was that for?

A Moonshine whiskey.

Q When was that, Mr. Shaw?

A I don't – couldn't give you the dates, I will say this though, I have a record – I can't give you dates, but I have a record of worthless checks, moonshine whiskey, counterfeiting and automobile.

Q And what is your age, Mr. Shaw?

A Beg your pardon?

Q What is your age?

A Thirty-eight.

[155]

Q How much of that time have you spent in jail?

A How much of that time?

Q Yes, sir.

A Well, I would say, I would say approximately, now this is approximately, I would say approximately six years. Did I understand you correct, in jail.

Q Yes, sir. Where are you from, Mr. Shaw?

A I am from Florida.

Q What part of Florida?

A Tallahassee.

Q That Leon County?

A Yes, sir.

Q How long have you lived in Leon County?

A How long?

Q Yes, sir.

A Off and on all my life, I lived up –

Q What kind of work do you follow at home?

A Well, I was assistant manager of finance company and as I said, I bootlegged a little, and I worked as a cook, drove a taxi.

Q Mr. Shaw, on the date that you had the counversation with Mr. Williams, did you have any particular purpose for being up on the second floor in Ward C?

A No, no more than I would have any other time, I was just there. This was on Saturday morning and as a rule on the weekend, I would go over to the office and catch up on my work that may be backlogged from the week. There was nothing pressing, I didn't have to go but I believe the **[156]** record will show that I spent most of my weekends at the office, more or less to break the monotony of the time.

Q What time of day was it you talked with him?

A It was the morning part of the day.

Q Now, when you had this conversation with Mr. Williams, where was he inside of Room 4?

A Yes.

Q What size room is that?

A I don't exactly know, I don't have it – never measured the room, it is – maybe I would say the room

is approximately, maybe twice as long as that table and approximately twice as wide.

Q Well, you have never had any occasion to measure it, would you say it is in the neighborhood of 12 feet deep and 8 or 9 feet wide?

A I would say it's approximately that.

Q It has a full size hospital bed in it at that time did it not?

A It has a regular hospital bed which is –

Q Well, regular size hospital bed?

A Yes, uh'huh.

Q Mr. Williams on the bed or sitting up there?

A He was on the bed.

Q Is the head of the bed toward the wall or toward the door?

A Is the head – now, I don't know which you would call the head, if you are familiar with the hospital beds, either end could be used as the head, which they are, and the particular instance you are asking about, you are wanting **[157]** to know which end his head was at, it was at the end facing the door – not facing the door, and toward the door, he was facing the wall.

Q He was facing the wall?

A His head, if he was looking out the window, he would be looking this way and his head was at this end of the bed.

Q Was he looking toward – what window, the outside window?

A Window here at the time the door – the door is here which is a wooden door, the door is here and he was–

Q Just a moment please. Let me ask you – would you draw a diagram of that door for us, please. The door you are speaking of opens into a hall, is that correct?

A Opens into a hall.

Q Yes.

A The door opens into the room.

Q Well, it opens off of the hall then?

A Yes, sir.

Q And opens into the room then?

A Yes, sir, it's a long corridor.

Q And if you had walked into that room, Room 4, Ward C, the bed at that time would have been on the right hand side of the room as you face toward the outside window, is that correct?

A Yes, sir.

Q And it would have been up in that right hand corner of the room?

A Yes, sir.

Q And ran lengthwise along the right hand wall?

[158]

A Yes, sir.

Q Now, you state, Mr. Williams' head was toward the door at the time?

A Yes.

Q Was he in position where he was looking at you, where you were talking at him?

A Yes, sir, he was looking back – you have to look back, Mr. Williams had only been out of the cast a short time.

Q Was the door opened or closed when you were talking to him, Mr. Shaw?

A The door was closed.

Q You talked to him through the door?

A No, sir, I talked to him through an opening which is approximately, well, I would say maybe ten by ten, something, which is an opening in the door about like this.

Q Yes, sir, is that opening just a wide opening or does it have glass or a grill or anything in it?

A No, sir, that opening has a piece of plate glass, window glass, just ordinary window glass, and a piece of steel mesh. It is no regular screen wire, it is something a little heavier than screen wire, and which has holes in it.

Q Yes, sir. Does this impede talking through the door at all?

A Beg your pardon?

Q Does this impede or interfere with your talking through the door?

A No, sir.

Q You just talk in a normal voice when you talk through that [159] door?

A Yes.

Q One would not have to raise his voice to hear through that?

A No.

Q You state it has a piece of plate glass in the window – in the opening, is that correct?

A Yes.

Q When you testified before, it did not have such a glass in it?

A No, sir, It didn't.

MR. THOMPSON: Mark these please.

(Whereupon Defendant's exhibits 1, 2, and 3 were marked for purposes of identification by the Court Reporter.)

BY MR. THOMPSON:

Q I hand you what the Clerk has identified – the Reporter identified as D-1 and ask you if that is a picture of that door, Room 4?

A I would say it looks like the door of Room 4.

Q That picture does have No. 4 to the left of the door does it not?

A Very faint.

Q Does that picture fairly disclose or represent the door as it existed at the time you are talking about?

A Yes, sir, it looks similar to it.

Q That picture taken from the outside or inside of the room, can you tell?

A I would presume from looking at the picture it was taken from the outside.

[160]

Q Would you say that fairly portrays and depicts the scene of Room 4 of Ward C, showing the opening in the door?

A If this is not it, it is a good imitation.

Q Very much like it, anyway?

A Yes, sir.

Q I hand you what has been identified as Defendant's Exhibit No. 3, and ask you if – that might be the inside of the door or does that fairly portray the inside of the door?

A Well, those rooms is more – I couldn't say that this was Room 4, I can say this, it could be Room 4.

Q That does – it does portray the type door we are talking about does it not?

A Well, –

Q It shows the grill work that you mentioned?

A Uh'huh.

Q Now, your conversation that you have testified to was carried on through that closed door?

A That's right.

Q Are you talking now at the voice you normally talk to – when you are talking through the door?

A Yes.

Q You talk about the tone and velocity you are speaking now?

A Well, I might vary a little, I wouldn't say this is the exact tone, I will say it is near the tone I would talk in.

Q How far would you say Mr. Williams' head was from where you were when you were talking to him?

A I would say his head was no more — pardon me, no more than the distance of this — this piece here.

[161]

Q What distance would you say that is, about five feet, four feet?

A Three or four feet, yes, sir.

MR. THOMPSON: You want to see that?

MR. HAMES: No.

MR. THOMPSON: You can come down.

MR. MERRITT: One further question.

REDIRECT EXAMINATION

BY MR. MERRITT:

Q You mentioned glass being in that opening, could you describe that glass a little better?

A Yes, sir, it is glass — it is glass, it is a protective —

Q I don't mean the purpose, nature of the glass.

A It is a piece, I would say it is no more than a piece of window pane, it's in this mesh I was telling you about.

Q Yes. How would you compare it to a normal window pane?

A I never measured but I say certainly no bigger than the normal window pane.

Q Bigger?

A It wouldn't be any smaller or bigger, I would say it's about those window panes there, look to be approximately the size of it.

Q How else could you describe it and compare it with the window pane?

A Well, if I may – what are you referring to?

Q Would it be thicker or thinner?

A I would say it wouldn't be any thicker, no, sir, it's just **[162]** regular piece of –.just a regular piece of glass, it is not a glass that you could break – you could break it if you hit it very easily, they have been broken by – maybe people wanted to push something in one of those rooms, they had isolated.

MR. MERRITT: All right, sir, come down.

MR. THOMPSON: I have a few more questions.

RECROSS EXAMINATION

BY MR. THOMPSON:

Q Mr. Shaw, when did you first officially call this information to anybody's attention?

A When did I recall it to anybody's attention?

Q Yes, sir, this conversation you had, when did you first call it to somebody's attention?

A Oh, let's see, I don't know the exact date that I called it to anyone's attention, I didn't agree – I didn't agree to testify until Thursday before the case started on a Monday.

Q Who did you tell about this conversation?

A Who did I tell about it?

Q Yes, sir, who did you first tell about it?

A The Deputy Marshall.

Q Deputy Marshall?

A Yes.

Q Didn't call it to the attention of any of the officials at the United States Penitentiary?

A That I did not.

Q What Deputy Marshall was this?

[163]

A Mr. Herndon.

Q Do you have any detainers against you?

A That I do.

Q Just what is a detainer?

A It is a detainer for a worthless check.

Q What is the detainer?

A It is another charge.

Q Charge pending against you, and you can't get out of jail on parole unless it's disposed of?

A No, sir, that is wrong.

Q What —

A You can — the Attorney General has at his discretion, he can turn you over to a State that has a detainer, if he so desires. The State can request you or the parole board can parole you at any time. As a matter of

fact, they are paroled a lot to the States now, people that have detainers.

Q Then, if you had some high spot in your prison life you might even get paroled with a detainer?

A As far as parole is concerned, if you will check the record, I have waived parole the first time, not the fact I didn't want parole, but I waived parole the first time and I went back up and the parole was denied. I don't know what reason — as far as parole is concerned, I am not even interested in parole.

Q You are not interested in parole?

A No.

MR. THOMPSON: You can come down.

* * *

[422]

(Whereupon the Jury was retired from the Courtroom.)

(Whereupon, the Jury was returned to the Courtroom.)

THE COURT: Gentlemen of the Jury, have you arrived at a verdict in this case?

JURY FOREMAN O. T. KITCHENS, JR., We have, Your Honor.

THE COURT: Before this verdict is received, let the Court caution the audience that there shall be no show of emotion and no outbursts of any kind.

Mr. Solicitor, you may receive the verdict.

MR. MERRITT: "We, the Jury find the defen-

dant guilty. O. T. Kitchens, Jr., Jury Foreman, October 21, 1965."

THE COURT: Let that verdict be received.

Court will remain in session.

I will be out for about 15 or 20 minutes.

Mr. Thompson, is there any reason why sentence should not be imposed in this case?

MR. THOMPSON: No, sir.

THE COURT: Let the Defendant stand.

Mr. Evans, the Jury has found you guilty in this case without a recommendation, it therefore becomes mandatory upon this Court as a matter of law to impose the following sentence.

The State of Georgia versus Alex S. Evans, No. 7284, Gwinnett Superior Court, September Term, 1965, charge of murder.

Whereupon, the Jury in the above stated case having returned the following verdict, "We, the Jury find [423] the defendant guilty. O. T. Kitchens, Jr., Foreman, October 21, 1965".

It is considered, ordered and adjudged by the Court that the defendant, Alex S. Evans, be taken from the bar of this Court to the common jail of Gwinnett County or to some other safe and secure place under such guard and protection as may be deemed necessary where he shall be safely and securely kept until his removal therefrom to the custody of the Director of the State Department of Corrections, for the purpose of the execution of this sentence in the manner prescribed by law.

It is further ordered and adjudged by the Court that on the 30th day of November, 1965, that the defendant, Alex S. Evans, shall be executed by the Director of the State Department of Corrections at such penal institution as may be designated by said Director, and witnessed only by the executing officer, defendant's relatives, counsel and such clergymen and friends as he may desire.

It is further ordered that the Sheriff of Gwinnett County together with such Deputies as he may deem necessary, the number of guards to be approved by the presiding Judge or Ordinary of said County, shall convey and deliver the said Alex S. Evans to the said Director of State Department of Corrections at such penal institution as may be designated by [424] said Director not more than 20 days and not less than 2 days prior to the time fixed herein for the execution of said condemned person.

And there delivered into the custody of the said Director.

And it is further ordered that the said defendant, Alex S. Evans, on the day fixed herein between the hours of 10:00 o'clock a. m., and 2:00 o'clock p. m., be by the Director of the State Department of Corrections electrocuted at the time and place and in the manner herein provided by law.

And may God have mercy on your soul.

Signed this 21st day of October, 1965.

Supreme Court of the United States

No. 829 --- *, October Term, 19* 68

A. L. Dutton, Warden,

Appellant,

v.

Alex S. Evans

APPEAL from the United States Court of Appeals for the Fifth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

February 24, 1969